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MEMO ENDORSED

January 26, 2015

Via ECF and Fax (212) 805-6326

The Honorable Colleen McMahon
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: Flo & Eddie, Inc. v. Sirius XM Radio Inc., Case No. 13-cv5784 (CM)

Dear Judge McMahon:

We represent plaintiff Flo & Eddie, Inc. ("Flo & Eddie") and write in response to the letter that counsel for Sirius XM Radio, Inc. ("Sirius XM") sent to you today. In that letter, counsel for Sirius XM asks the Court not only to rule on a motion that Sirius XM previously filed, but also to rule on a motion that Sirius XM *never* filed.

The starting point of counsel's letter is a request that the Court rule on Sirius XM's previously filed motion (Dkt. 99) to certify the Court's November 14, 2014, summary judgment ruling for interlocutory appeal (Dkt. 88-1). For all the reasons previously stated in Flo & Eddie's opposition (Dkt. 106), that motion (and, thus, Sirius XM's first request) should be denied.

Counsel for Sirius XM then makes the tag-along request that if the Court grants Sirius XM's prior motion to certify, it should also certify its December 12, 2014, and January 15, 2015, orders for interlocutory appeal (Dkts. 108 and 114). Sirius XM has never filed a motion seeking certification of those orders and has made no attempt to comply with the requirements of 18 U.S.C. § 1292(b). In fact, counsel does not even explain in its letter what portion of the two new orders Sirius XM thinks is certifiable. As the proponents of certification, Sirius XM has the burden of showing that the orders it wants to certify for interlocutory appeal meet the substantive

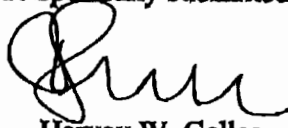
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DOCUMENT
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DOC #:
DATE FILED: 1/28/15 hgradstein@gradstein.com

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1/28/2015
Your second point is indisputably correct. If I were to certify it, I would only be the original order. 11/14/2017
Not same I need.
Keep 11/14/2017
Colleen McMahon

test under § 1292(b). *In re Facebook, Inc.*, 986 F. Supp. 2d 524, 529 (S.D.N.Y. 2014). It has not made that showing. Thus, Sirius XM's second request should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'H. Geller', written over the typed name.

Harvey W. Geller

cc: All counsel

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To: Hon. Colleen McMahon

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Pages: 3 (including cover)

Phone:

Date: January 26, 2015

Re: Flo & Eddie v. Sirius XM Radio Inc

Case No. 13-cv-5784 (CM)

Comments: Please see attached correspondence.